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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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No. 1584

ASSOCIATION OF PERSONNEL AGENCIES OF NEW YORK, INC., DON WALDRON & ASSOCIATES, INC., PRESTON ASSOCIATES, INC., SNELLING AND SNELLING OF BINGHAMTON, INC., and SNELLING AND SNELLING OF UPPER MANHATTAN, INC.,

Appellants,

against

PHILIP ROSS, As Industrial Commissioner of the State of New York, and BRUCE C. RATNER, Commissioner of Consumer Affairs of the City of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF APPELLEE PHILIP ROSS TO DISMISS OR AFFIRM

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Appellee Philip Ross, Industrial Commissioner of the State of New York, moves pursuant to Rule 16 of the Rules of this Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Court of Appeals of the State of New York on the ground that it presents no substantial federal question.

Opinions Below

The opinion of the Court of Appeals of the State of New York, dated February 7, 1978, is officially reported at 43 N Y 2d 873. The opinion of the Supreme Court of the State of New York, County of New York, is unreported. These opinions are included in the Appendix to appellants' Jurisdictional Statement at pp. 1-a and 2-a, respectively.

Counterstatement of the Case

The State of New York has regulated the business of employment agencies since 1909. The employment agency law, Article 11 of the New York General Business Law ("GBL"), § 170 *et seq.*, was enacted to regulate the relations between employment agencies and applicants for employment and for the protection of the public in general from fraud. Employment agencies subject to regulation thereunder are essentially defined and classified on the basis of whether or not they charge a fee for their services. GBL § 171.2.

Appellants are four employment agencies subject to regulation under Article 11 of the GBL and their trade association. Their contention that they are denied equal protection of the laws is twofold:

(1) that GBL § 171.2 defines certain persons and businesses as "employment agencies" and subjects them to penal sanctions under GBL § 190 for engaging in sex discrimination as prohibited by GBL 187(15)-(17), while all other persons and businesses that engage in sex discrimination are subject only to the provisions of Article 15 of the New York Executive Law, known as the Human Rights Law ("HRL"), which allegedly does not include any penal sanctions.

(2) that GBL § 171.2(e) excludes from the definition of "employment agency", and thus from subjection to the penal sanctions that GBL § 190 applies to sex discrimination as prohibited by GBL § 187(15)-(17), certain persons and businesses that the HRL defines as "employment agencies."

The provisions of GBL, Article 11, which appellants challenge, subdivisions (15), (16) and (17) of § 187, were enacted by the New York State Legislature in Ch. 814 of the Laws of 1976, which became effective September 1, 1976.* These provisions generally prohibit employment agencies subject to Article 11 from discriminating on the basis of sex and also prohibit, as sex-discriminatory, certain activities regarding applications for the services of such employment agencies.

Prior to the effective date of the challenged provisions, employment agencies regulated by the State pursuant to GBL, Article 11, were subject to the penal sanctions contained in GBL § 190 if they engaged in any of the activities prohibited by Article 11 in GBL §§ 172, 173, 176, 184, 185, 186 and 187(1)-(14). Therefore, the acts of sex discrimination prohibited by GBL § 187 (15), (16) and (17) are simply additional grounds for the imposition of the penal sanctions already provided for in GBL § 190.**

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* The challenged provisions are set forth in appellants' Jurisdictional Statement at pp. 3-4.

** The penal sanctions provided for in GBL § 190 as well as the classification of employment agencies subject to State regulation contained in GBL § 171 existed before the enactment of GBL § 187(15)-(17). Thus, the current opposition of appellant Association of Personnel Agencies of New York, Inc. ("APANY") to the application of the penal sanctions and the classification in the limited instance of sex discrimination is ironic. As recently as 1975, APANY opposed neither the classification nor the penal sanctions, but actually supported legislation that increased the penal sanctions to their present level. See 1975 McKinney's Session Laws p. 1763, Governor's Memorandum to Ch. 632 of the Laws of 1975.

The Supreme Court of the State of New York, County of New York, found that appellants had not sustained the heavy burden of showing that the challenged legislation violated the Constitutions of the United States and New York. The New York State Court of Appeals unanimously affirmed.

Argument

This Court has previously recognized that the regulation of employment agencies by the States is motivated by concern for the welfare of the public. *Olsen* v. *Nebraska ex rel. Western Reference Board Assn.*, 313 U.S. 236 (1941); *Brazee* v. *People of State of Michigan*, 241 U.S. 340 (1916). This Court has also noted and deplored the existence of unlawful discrimination on the basis of sex. *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973). Since it is common knowledge that employment agencies like appellants that are subject to State regulation under the GBL deal with large numbers of women applicants in fee-generating situations, the very nature of appellants' business warrants their being subjected to rigorous standards of conduct and supports the decision of the New York State Legislature to make sex discrimination an additional ground for the criminal liability already provided for in GBL § 190.

There is no constitutional requirement, furthermore, that the GBL and the HRL treat discrimination on the basis of sex in identical fashion, for the two statutes serve different purposes and are clearly capable of coexistence. *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976). The purpose of Article 11 of the GBL is to license and regulate employment agencies and to provide for sanctions against those acting under the law in violation of such an important safeguard. GBL § 170 *et seq.* The purpose of the HRL is to prohibit discrimination and provide administrative sanctions. HRL § 290. In addition, contrary to appellants' representations, the HRL does provide, in Executive Law § 299, penal sanctions which are applicable to employment agencies that wilfully violate an order of the State Division of Human Rights. The penal provisions contained in GBL § 190 apply not only to the sex discrimination prohibited by GBL § 187(15)-(17), but also to all the other prohibited acts set forth in Article 11 of the GBL in sections 172, 173, 176, 184, 185, 186 and 187(1)-(14).

It is abundantly clear that the "Equal Protection Clause does not require that every state regulatory statute apply to all in the same business." *Morey* v. *Doud*, 354 U.S. 457, 465 (1957). If the statutory classification is reasonably related to the purpose of the act in which it is found, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . .; in the local economic sphere it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303-304 (1976).

Moreover, the mere fact that the GBL subjects only certain businesses functioning as employment agencies to criminal penalties does not amount to a constitutional violation. The concept of equal protection of the laws does not require the State to remedy every aspect of a problem or to apply its procedures with strict mathematical equality. *Dandridge* v. *Williams*, 397 U.S. 471, 487 (1970).

Thus, in *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955), this Court rejected a contention that an Oklahoma statute violated the Equal Protection Clause by exempting sellers of ready-to-wear glasses from a requirement that only licensed optometrists or opthalmologists could fit, duplicate or replace lenses. Similarly, in *Ferguson* v. *Skrupa*, 372 U.S. 726, 732 (1963), this Court held that a

Kansas statute excepting lawyers from a provision making it a misdemeanor to engage in the business of debt adjusting did not deny equal protection to non-lawyers.

It is well-settled that the type of legislation which is the subject of this action is "reasonable in relation to its subject and is adopted in the interests of the community." *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 397 (1937). This appeal, therefore, presents no substantial federal question for this Court's determination and should be dismissed.

CONCLUSION

The appeal should be dismissed or in the alternative the decision of the New York State Court of Appeals should be affirmed.

Dated: New York, New York
May 19, 1978

Respectfully submitted,

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